



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

August 8, 2023

Re: FOIA Request NLRB-2023-001798

Dear Charlie O Willard:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on July 21, 2023, in which you seek “any and all information, including documents and transcript associated with” *IBEW Local 304*, Case No. 14-CA-318185. You assumed financial responsibility for the processing of your request in the amount of \$37.00.

We acknowledged your request on July 21, 2023.

Your request is granted in part and denied in part, as explained below.

A search of the Agency’s electronic casehandling system, NxGen, has been conducted. This search has located 21 pages of responsive, releasable records from the requested case file, which are attached. The search located no transcript record in the file.

After a review, I have determined that portions of the records are exempt from disclosure under Exemptions 5, 6, 7(C), and 7(D) of the FOIA (5 U.S.C. § 552(b)(5), (b)(6), (b)(7)(C), and (b)(7)(D)). Specifically, redactions have been made pursuant to FOIA Exemption 5, which protects certain intra-agency communications protected by the attorney work product privilege. Furthermore, redactions have been made the records to protect the privacy interests of individuals named therein. These redactions were made pursuant to FOIA Exemption 6, which protects personally identifying information the release of which would constitute a clearly unwarranted invasion of personal privacy; FOIA Exemption 7(C), which protects records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy; and Exemption 7(D), which protects information the release of which “could reasonably be expected to disclose the identity of a confidential source...” where the information is provided under an express assurance of confidentiality, or in circumstances from which such an assurance could be reasonably inferred. 5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D).

Your request is denied to the extent that other responsive records identified from the search are being withheld in their entirety pursuant to FOIA Exemptions 5, 6, 7(C), and 7(D) (5 U.S.C. § 552(b)(5), (b)(6), (b)(7)(C), and (b)(7)(D)).

Regarding FOIA Exemption 5, 5 U.S.C. § 552(b)(5), three pages which consist of an internal memorandum containing the field attorney's recommendations to Regional management, are withheld.

Exemption 5 allows agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," and covers records that would "normally be privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep't. of Justice*, 591 F.2d 753, 772 (D.C. Cir.1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, "it must form a part of the agency's deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not "identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a predecisional record is not altered by the subsequent issuance of a decision, *see, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

The attorney work-product privilege protects records and other memoranda that reveal an attorney's mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See *United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; see also *Wolfson v. United States*, 672 F. Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.*

Here, the three-page responsive record being withheld meets the requirements for Exemption 5 protection under both the deliberative process and attorney work-product privileges. It is internal and predecisional, and reflects the views of the General Counsel's Regional staff concerning prosecutorial policies and strategies in the processing of the unfair labor practice case. Since it contains proposed legal strategy, this internal casehandling record reflects the deliberative and consultative process of the Agency that Exemption 5 protects from disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the record is also attorney work-product, as it reflects the analysis and/or opinions of the General Counsel's staff and was created to assist superiors in their decision-making process, in anticipation of possible litigation. Accordingly, the record is being withheld in their entirety.

Other pages of investigatory records are being entirely withheld under FOIA Exemptions 6, 7(C), and 7(D), since their disclosure could constitute an unwarranted invasion of privacy and/or reveal a confidential source, which include confidential witness statements.

Exemption 6 permits agencies to withhold information about individuals in "personnel and medical and similar files" where the disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016). The "files" requirement covers all

information that “applies to a particular individual.” *Ayuda, Inc. v. FTC*, 70 F.Supp.3d 247,264 (D.D.C. 2014) (citing *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 601-02 (1982)). “‘Similar files’ has been interpreted broadly to include ‘[g]overnment records on an individual which can be identified as applying to that individual.’” *Pavement Coatings Technology Council v. United States Geological Survey*, 2019 WL 7037527, *8 (D.D.C. Dec. 19, 2019) (quoting *Wash. Post Co.*, 456 at 602). See *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 198-199 (D.C. Cir. 2006) (Exemption 6 may exempt not just files, but personal information such as names and addresses). Exemption 7(C) permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989), see also *Brennan Center for Justice at New York University School of Law v. DOJ*, 2020 WL 1189091, *3-4, (D.D.C. Mar. 12, 2020) (reaffirming that Exemption 7(C) imposes a “lower bar for withholding” than Exemption 6,).

Application of Exemptions 6 and 7(C) requires a two-part balancing test that considers: (1) whether there is a legitimate personal privacy interest in the requested information, and, if so; (2) whether there is a countervailing public interest in disclosure that outweighs the privacy interest. *Judicial Watch, Inc. v. Nat’l Archives & Records Admin.*, 214 F. Supp. 3d 43, 58 (D.D.C. 2016), *aff’d*, 876 F.3d 346 (D.C. Cir. 2017), citing *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004). With respect to the first factor, the Supreme Court has described Exemptions 6 and 7(C) as reflecting privacy interests in “avoiding disclosure of personal matters,” *Reporters Comm.*, 489 U.S. at 762, maintaining the “individual’s control of information concerning his or her person,” *id.* at 763, avoiding “disclosure of records containing personal details about private citizens,” *id.* at 766, and “keeping personal facts away from the public eye,” *id.* at 769. Consistent with these concerns, privacy interests have been recognized for individuals named in a law enforcement investigation, including third parties mentioned in investigatory files, as well as witnesses and informants who provide information during the course of an investigation. See *Rugiero v. U.S. Dep’t of Justice*, 257 F.3d 534, 552 (6th Cir. 2001); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995); and *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985). With respect to the second factor, the public’s interest in disclosure depends on “the extent to which disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contribut[ing] significantly to public understanding of the operations or activities of the government.’” *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (emphasis in original), quoting *Reporters Comm.*, 489 U.S. at 775. As the Supreme Court further explained in *Nat’l Archives & Records Admin.*, 541 U.S. at 172, to defeat a privacy interest there must be some indication that the “public interest sought to be advanced is a significant one, an interest more

specific than having the information for its own sake . . . [and that] the information is likely to advance that interest.”

Applying the above balancing test, I have determined that the personal privacy interests at stake outweigh any public interest, and for this reason, the records are exempt from disclosure. The withheld records are investigative files created or obtained by the Agency for the purpose of enforcing the National Labor Relations Act, and contain individuals’ names, addresses, and other identifying information that fit squarely within the types of privacy interests that Exemptions 6 and 7(C) were intended to protect from disclosure. By contrast, I perceive no countervailing public interest in disclosure. Absent a public interest that outweighs the private interests identified, the records are protected from disclosure under Exemptions 6 and 7(C) and are being withheld.

In addition to Exemptions 6 and 7(C), confidential witness records are withheld under Exemption 7(D). They contain information provided to the Agency under an express promise of confidentiality, and, accordingly, are exempt from disclosure. Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that “could reasonably be expected to disclose the identity of a confidential source . . .” 5 U.S.C. § 552(b)(7)(D). A “source” is considered confidential if he or she “provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred.” See *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. See *Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981).

One of the purposes underlying Exemption 7(D) is to “encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants’ identities confidential.” *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is “particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses” who are often the “sole source of the Board’s information in unfair labor practice cases.” *Id.* (“An employee-informant’s fear of employer retaliation can give rise to a justified expectation of confidentiality.”). Significantly, a source’s identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. See, e.g., *Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir.1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep’t of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep’t of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has been closed. *Ortiz*, 70 F.3d at 733.

For the purpose of assessing fees, we have placed you in Category D, the “all other requesters” category, because you do not fall within any of the other fee categories. Consistent with this fee category, you will be assessed charges to recover the reasonable direct costs for searching for the requested records, except that you will not be charged for the first two hours of search. NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(2)(ii)(D). Charges for all categories of requesters are \$9.25 per quarter hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Less than two hours of professional time was expended in searching for the requested material. Accordingly, there is no charge assessed for this request.

You may contact Stephanie Hanson, the Attorney-Advisor who processed your request, at (202) 501-8648 or by email at stephanie.hanson@nrlb.gov, as well as the Agency’s FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the FOIA Public Liaison is:

Kristine M. Minami, FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nrlb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

August 8, 2023

Page 7

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt, Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlrb.gov

Any appeal must be postmarked or electronically submitted within 90 calendar days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ Synta E. Keeling

Synta E. Keeling
FOIA Officer

Attachment: (21 pages)